Supreme Court No. _____
Court of Appeals No. 75817-9-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN DUBLIN,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Brian Dublin, the petitioner, asks this Court to review the Court of Appeals' decision issued on October 16, 2017. The Court of Appeals denied Mr. Dublin's motion for reconsideration on December 12, 2017. Copies of these rulings are attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Judges must not only be impartial, they must appear impartial to an objective observer. The Court of Appeals reversed an order denying Mr. Dublin's motion for postconviction DNA testing because the trial judge applied the wrong standard. Shortly thereafter, without giving Mr. Dublin notice or an opportunity to be heard and before the appellate decision was final, the same judge denied the motion again. Although the judge later vacated this order, she refused to disqualify herself and denied the motion a third time. Should the Court of Appeals have reversed because controlling precedent dictated that the trial judge should have recused herself? RAP 13.4(b)(1), (3), (4).

2. A woman was raped in her bedroom. DNA from a rape kit indicated Mr. Dublin was the perpetrator, but Mr. Dublin testified he had consensual sex with the woman in his truck. Items from the woman's bedroom were collected, but not tested. Following precedent, should the

Court of Appeals have reversed because exculpatory DNA test results would show that Mr. Dublin is likely innocent? RAP 13.4(b)(1), (2).

C. STATEMENT OF THE CASE

Mr. Dublin was convicted of rape and burglary charges arising out of separate incidents on Vashon Island. Mr. Dublin seeks to prove his innocence.

The first incident concerned a rape that occurred in a young woman's home. A.B. testified that on October 8, 2013, when she was 18 years old, she awoke in her bed around 3 a.m. and saw a man in her room. RP 572, 576, 579-80. The man, who had a "plump" build, was wearing some kind of mask and possibly had a knife; he told A.B. to be quiet and threatened her. RP 312, 370, 580, 583, 586. The man had a voice that sounded like it belonged to an old man. CP 68. He had sex with A.B and left. RP 586-88. A.B. then woke up her step-father, who was the only other person there, and called 911. RP 592.

A.B. was taken to Harborview hospital in Seattle. RP 302. A.B said she was unsure if her assailant had ejaculated. RP 523. She stated that she had last had consensual sex a couple of months before. RP 639. Medical personal collected oral, anal, vaginal, perineal, and skin swabs from A.B. RP 475, 599, 839. A forensic scientist found sperm on the vaginal and anal swabs. RP 844, 847. The DNA profiles from both sperm

samples were the same. RP 846-48. Analyzing a swab from A.B.'s neck, she found a mixture with DNA from two people, a major and a minor profile. RP 850-51. The scientist assumed the minor profile was A.B.'s and determined the major profile was the same as the unknown male profile from the sperm samples. RP 851-52. Analyzing a swab from A.B.'s breast, the scientist found the same male profile. RP 852-53.

Police collected evidence from A.B.'s bedroom. RP 409-14; CP 64, 66. Police seized a pair of grey underwear, left on A.B.'s snowboard, that A.B. said belonged to the assailant. RP 414-16; CP 64, 66. Police also seized pillow cases from the bed, a bed sheet, a pair of scissors (which the suspect might have used as a weapon), and a very large stuffed panda bear that A.B. said the assailant had his head on. RP 410-11, 413; CP 64, 66.

The male profile obtained from the sexual assault kit did not "match" anyone in the DNA database. RP 854. The evidence from A.B.'s bedroom was not tested. The case went cold. RP 341.

In 2010, Mr. Dublin was implicated as a suspect in a rape case involving E.P. Mr. Dublin's DNA profile "matched" DNA obtained from a sperm fracture recovered from E.P.'s person. RP 711, 1085. This profile also "matched" the unknown profile from A.B.'s case. RP 699,

856-57. Mr. Dublin denied entering A.B.'s and E.P's homes and raping them. RP 2139-2140.

Mr. Dublin briefly attended the same party E.P. attended the night before. RP 804, 1210, 1578, 2127. At that party, Mr. Dublin testified he had consensual sex with E.P. in his truck. RP 2128. Cassie Bosworth, who was E.P.'s close friend, testified she saw E.P. in a truck that evening, but did not know whose truck it was. RP 910, 1618-19. E.P. denied having a sexual relationship with Mr. Dublin. RP 1659.

Concerning A.B., Mr. Dublin testified that he knew A.B, spent time with her, and had consensual sex with her. RP 2113, 2115-16. He recalled having sex with her in his truck after a party, but could not remember the exact date. RP 2115. Amy McFalls testified that she had seen A.B. and Mr. Dublin together more than once, including after a party in 2003. RP 1787-89. A.B. claimed to not know Mr. Dublin or to have spent time with him. RP 602. This was despite A.B. being close in age to Mr. Dublin, attending the same high school with him, and admitting that she knew both Mr. Dublin's sister and the mother of Mr. Dublin's child. RP 573, 598, 600-02, 2112, 2117.

Police collected four useable prints from A.B.'s room in 2003 and four useable prints in E.P.'s case. RP 1939-42, 1947. All these prints excluded Mr. Dublin. RP 1942, 1947.

Mr. Dublin was charged with raping A.B. and E.P. The State also alleged he was the culprit in an unsolved attempted sexual assault that occurred in 2006 against G.G. G.G. was unable to identify Mr. Dublin as her assailant. RP 1335-36, 1352-53, 1355, 1525. Mr. Dublin denied he was the perpetrator. RP 2136.

During their investigation, police recovered a notebook in a room that Mr. Dublin had lived in. RP 2166-67. The room was previously occupied by Mr. Dublin's sister. RP 2166-67. The notebook was filled with writing. RP 1146. On a couple of pages, there was a list inside with A.B.'s name on the top, the initials G.G. eight lines down, and E.P.'s first name four lines down on the next page. [1] RP 1146-47, 2033-36. Mr. Dublin denied ownership of the notebook. RP 2140.

At trial in 2011, Mr. Dublin was convicted of first degree rape of A.B., first degree rape of E.P., attempted first degree rape of G.G., and three related counts of first degree burglary.[2] CP 23-26.

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[1] The Court of Appeals' factual recitation on this matter is erroneous. The court stated: "A.B.'s full name was at the top of the list, E.P.'s full name was at the bottom of the list, and G.G.'s initials were in the middle of the list." Slip. op at 4 (emphasis added). This is incorrect. RP 1146-47, 2033-36. It is also contradictory to what the Court of Appeals stated in its previous opinion. State v. Dublin, 192 Wn. App. 1051 (2016) (unpublished).

[2] The jury acquitted Mr. Dublin of charges for attempted indecent liberties and fourth degree assault involving a different young woman. RP 871; CP 22, 27, 34.

In October 2014, Mr. Dublin moved for DNA testing of the items gathered from A.B.'s bedroom (underwear, bedding, large stuffed animal, and scissors). CP 49-87. The same judge who presided over Mr. Dublin's trial, Judge Laura Gene Middaugh, decided Mr. Dublin's motion without oral argument on November 17, 2014. CP 88-89. Judge Middaugh noted that the State had not responded so she assumed there was no objection to DNA testing. CP 88-89. Nevertheless, Judge Middaugh denied Mr. Dublin's request, ruling that Mr. Dublin "has not shown the likelihood that the DNA evidence would demonstrate the defendant's innocence on a more probable than not basis." CP 88-89. The State filed a belated response on November 21, 2014, opposing DNA testing. CP 95-106.

Mr. Dublin appealed. On February 29, 2016, in an unpublished opinion, the Court of Appeals reversed Judge Middaugh's ruling because the record did not show that she applied the correct standard. State v. Dublin, noted at 192 Wn. App. 1051 (2016); CP 113-16.

On March 29, 2016, before the Court of Appeals issued the mandate and without giving Mr. Dublin notice or an opportunity to be heard, Judge Middaugh issued a new order denying Mr. Dublin's motion. CP 107. In the order, Judge Middaugh claimed to have applied the correct standard. CP 107. Mr. Dublin moved to vacate the order. CP 117. On April 28, 2016, Judge Middaugh vacated the order as "premature,"

agreeing that the order was unlawful because the appellate mandate had not yet issued. CP 117-18.

In May 2016, Mr. Dublin moved to disqualify Judge Middaugh from the case, citing the appearance of fairness doctrine. CP 131-210. The State opposed the request. CP 211-14. Judge Middaugh refused to disqualify herself. CP 215-220.

In July 2016, Mr. Dublin filed a supplemental memorandum in support of his motion for DNA testing. CP 221- 238. The State continued to oppose testing. CP 119-28. On August 19, 2016, Judge Middaugh again denied Mr. Dublin's motion.[3] CP 609-10.

The Court of Appeals rejected Mr. Dublin's arguments on appeal that Judge Middaugh erred by failing to recuse herself and that he was entitled to DNA testing. Mr. Dublin seeks this Court's review.

D. ARGUMENT

1. Despite an appearance of unfairness, the trial judge refused to recuse herself and denied Mr. Dublin's motion for postconviction DNA testing a third time. Contrary to this Court's precedent, the Court of Appeals improperly held recusal was not required.

Due process entitles litigants to an impartial, unbiased judge. U.S. Const. amend. XIV; Const. art. I, § 3. Williams v. Pennsylvania, __ U.S.

[3] A copy of this order is attached in the appendix of the Opening Brief.

__, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016); State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 202 P.2d 927 (1949). In Washington, the law demands not only "an impartial judge; it also requires that the judge appear to be impartial." State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (internal quotation marks omitted). This is the appearance of fairness doctrine.

Consistent with due process, the appearance of fairness doctrine requires a judge to recuse if "the judge's impartiality might reasonably be questioned . . ." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); cf. Rippo v. Baker, __ U.S. __, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017) (due process requires recusal when a "risk of bias" is "too high to be constitutionally tolerable."). The appearance of fairness test is objective and "assumes a reasonable observer knows and understands all the relevant facts." Solis-Diaz, 187 Wn.2d at 540.

Judge Middaugh denied Mr. Dublin's motion for post-conviction DNA testing in 2014. On February 29, 2016, the Court of Appeals reversed Judge Middaugh's ruling because the record did not show that she applied the correct standard. State v. Dublin, noted at 192 Wn. App. 1051 (2016); CP 113-16. Twenty-nine days later and *on her own motion*, Judge Middaugh again denied Mr. Dublin's motion. CP 107. This was before the appellate court's opinion became the decision terminating

review and before the appellate mandate was issued. RAP 12.5(b). Mr. Dublin was also not afforded notice or an opportunity to be heard.

In general, when a matter is under review at the Court of Appeals, the trial court lacks authority to act in the case. RAP 7.2(a); Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Comm'rs, 92 Wn.2d 844, 853, 601 P.2d 943 (1979). Therefore, Judge Middaugh's actions were unlawful. On Mr. Dublin's motion, Judge Middaugh correctly vacated the order, agreeing it violated the Rules of Appellate Procedure and ruling it was "premature." CP 117.

Judge Middaugh, however, refused to accept the next logical step—recusal. CJC Cannon 2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.") (emphasis added). Mr. Dublin moved to disqualify Judge Middaugh under the appearance of fairness doctrine, but she denied his motion. CP 134.

Because Judge Middaugh acted with an appearance of bias when she denied Mr. Dublin's request for DNA testing for a second time, she should have recused herself from adjudicating the matter for a third time. Her ruling was done hastily, unlawfully, and without providing Mr. Dublin notice or opportunity to be heard. As any first year law student knows, due process requires—at a minimum—notice and an opportunity

to be heard. Boddie v. Connecticut, 401 U.S. 371, 377-78, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971). It is reasonable to infer that Judge Middaugh also knew this, but she proceeded anyways.

An objective observer would conclude that these circumstances show more than mere legal error. Rather, an objective observer would conclude they show a judge who appeared to not want to hear from Mr. Dublin again on the issue. Her ruling also appeared to be an attempt to "moot" the issue and ensure that Mr. Dublin not be appointed counsel on remand. In short, her actions plainly evidenced an appearance of bias.

This Court's opinion in Solis-Diaz supports this conclusion. There, following remand for resentencing, the trial judge denied the defendant's request for an exceptional downward sentence and imposed the same sentence as before. Solis-Diaz, 187 Wn.2d at 538-39. The Court of Appeals reversed and remanded for resentencing, but refused the defendant's request to disqualify the judge. Id. at 539. This Court reversed, holding reassignment was necessary. Id. The court noted the rule that reassignment on appeal is usually proper when "the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, *or* otherwise prejudged the issue." Id. at 541 (emphasis added) (internal quotation omitted). The court held

that the record indicated that the trial judge's impartiality might reasonably be questioned. Id. The judge would have to exercise discretion regarding the same sentence he already imposed *twice* and, given that the judge had already reached a firm conclusion as to the propriety of this sentence, he might not be amenable to considering the matter again with an open mind. Id. Thus, remand to another judge was required. Id.

Here, Judge Middaugh's actions are the functional equivalent to what happened in Solis-Diaz. Although there are no oral comments from Judge Middaugh showing "frustration and unhappiness" about the appellate court's remand—recall that the court did not hold a hearing before ruling, the judge's actions show the same. Solis-Diaz, 187 Wn.2d at 541. Judge Middaugh's actions not only evidenced bias, they strongly suggested that she had reached a firm conclusion on the merits of Mr. Dublin's motion and would continue to deny his motion regardless of the correct standard and the parties' arguments. Id. Therefore, the Court of Appeals should have held Judge Middaugh abused her discretion in refusing to disqualify herself.

In ruling otherwise, the Court of Appeals relied on facts occurring *after* the rejection of Mr. Dublin's request for recusal. Slip op. at 12 (Mr. "Dublin points to nothing indicating that Judge Middaugh failed to

consider all the evidence before her on remand."); slip. op at 12 n.4 (noting that Mr. "Dublin conceded that the judge considered the briefing and other materials submitted on remand."). This misapplies the standard. Whether Judge Middaugh erred in denying Mr. Dublin's motion for disqualification cannot turn on what happened afterward. She either erred at the moment of her ruling, or did not. That Judge Middaugh may have appeared to act impartially *afterward* (perhaps because she now knew the issue of bias would be an issue on appeal) cannot remedy an earlier error in denying Mr. Dublin's motion for disqualification. See State v. Gamble, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010) (in rejecting argument that trial judge's refusal to recuse violated appearance of fairness doctrine, Court analyzed facts preceding motion to recuse).[4]

Review should be granted on this issue because the governing criteria is met. The appellate court's opinion is in conflict with this Court's precedent applying the appearance of fairness doctrine. RAP 13.4(b)(1). The issue is also one of constitutional dimension because Mr.

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[4] Although not central to Mr. Dublin's argument on why recusal was required, the record further shows there was an *ex parte* contact, via email, between the judge (through the judge's bailiff) and the prosecutor in late 2014, which was shortly before the court first ruled on the motion for DNA testing. Br. of App. at 31. Bailiffs are the "alter-ego" of judges. State v. Watson, 155 Wn.2d 574, 579-80 & n.4, 122 P.3d 903 (2005); State v. Bourgeois, 133 Wn.2d 389, 407-08, 945 P.2d 1120 (1997). Therefore, contrary to the Court of Appeals' footnote stating otherwise, slip. op at 10 n.3, Mr. Dublin provided evidence of an *ex parte* contact.

Dublin had a right under due process to disqualification when the risk of bias is high. RAP 13.4(b)(3). Finally, the issue is one of substantial public interest because it concerns a basic issue of the administration of justice in the trial courts and the public needs to be confident that trial judges will recuse themselves when required by the law. RAP 13.4(b)(4).

2. Favorable DNA evidence from the untested items recovered from A.B.'s bedroom would demonstrate Mr. Dublin's innocence on a more probable than not basis. The Court of Appeals should have reversed and instructed that Mr. Dublin's motion be granted.

Washington's postconviction DNA statute allows a convicted person to move for DNA testing of evidence. RCW 10.73.170. The court must grant the motion if the procedural components are satisfied and the movant has satisfied the substantive component, which asks if the movant "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170.

In analyzing if the movant has met his burden, the court must assume the results would be exculpatory. State v. Crumpton, 181 Wn.2d 252, 260, 332 P.3d 448 (2014). If these hypothesized exculpatory results would show that the convicted person is likely innocent of a convicted offense, then the motion should be granted. Id.

In this case, an unknown man entered A.B.'s bedroom and raped her. RP 572, 576, 579-80, 586-88. Nearly a decade later, DNA test

results from a rape kit implicated Mr. Dublin and he was convicted. RP 699, 856-57; CP 23-26. Mr. Dublin maintains his innocence. At trial, he recalled having consensual sex with A.B. in his truck, but did not remember the exact date. RP 2115. Items gathered by police from A.B.'s bedroom were not tested for DNA. This included bedding the assailant touched and possibly left semen upon, a large stuffed animal the man had his face on, scissors he may have held, and underwear he left behind. CP 49-87.

Favorable DNA test results from these items, meaning a male profile belonging to someone other than Mr. Dublin, would indicate that Mr. Dublin had not been in A.B.'s room and that another man had been. Excluding the DNA evidence analyzed from A.B.'s person, there was no physical evidence linking Mr. Dublin to A.B.'s room. Favorable results would corroborate Mr. Dublin's testimony that he had not been in A.B.'s room and that he had consensual sex with A.B. in his truck. This evidence would show that he was wrongfully convicted of rape and burglary.

In concluding otherwise, the Court of Appeals reasoned that even if another man's DNA was found on A.B.'s bedding, this would not show a likelihood of innocence because the evidence against Mr. Dublin was strong. Slip. op at 9. This misapplies the standard. Courts must be mindful that "there will always be strong evidence against a convicted

individual since they were convicted of the crime beyond a reasonable doubt." Crumpton, 181 Wn.2d at 262 (holding testing was required despite strong evidence of guilt). Courts "should not focus on the weight or sufficiency of evidence presented at trial to decide a motion for postconviction DNA testing." Id. Rather, courts "must focus on the likelihood that DNA evidence could demonstrate the individual's innocence in spite of the multitude of other evidence against them." Id.

The Court of Appeals' reasoning that exculpatory results would not show innocence in light of strong evidence is contrary to controlling precedent. RAP 13.4(b)(1), (2). Accordingly, this Court should grant review.

The case also presents an unresolved issue on how courts should evaluate requests to test items when there is conflicting evidence. Trial courts have "discretion to consider all relevant evidence in deciding a question under RCW 10.73.170." State v. Gentry, 183 Wn.2d 749, 767, 356 P.3d 714 (2015). But what if the relevant evidence is conflicting as to the probative value of an item sought to be tested?

Here, law enforcement collected underwear from A.B.'s room because A.B. told Detective Gordon that the assailant had worn the underwear. CP 66; RP 414-16. At trial, the State did not elicit contrary testimony from A.B. or Detective Gordon. RP 524-39, 573-604, 749-60;

2031-63, 2082-87. Nevertheless, the Court of Appeals reasoned that testing of this item was not warranted because the record did not establish that the assailant wore the underwear. Slip. op at 8. To be sure, there was no corroborating testimony from either A.B. or Detective Gordon at trial, but that does not mean the underwear was not worn by the assailant.

Criminal trials are not designed to create a record concerning the probative value of potential DNA evidence. A defendant may reasonably choose not to elicit testimony or present evidence because a lack of evidence may support an argument that the State has not met its burden to prove the charged offense beyond a reasonable doubt.

Given that there was some evidence indicating that the assailant had worn the underwear, the matter should be followed up with, not dismissed outright. When there is conflicting evidence or the record is undeveloped, the remedy should be a reference hearing. This is what happens in cases involving personal restraint petitions, which are also postconviction motions. RAP 16.11(b) (when a personal restraint petition cannot be solely determined on the record, appellate court should order a reference hearing).

The trial court found that testing of the underwear would have been warranted if the evidence had established that it was worn by the perpetrator. CP 610. Mr. Dublin submitted evidence that this was true.

RP 414-16; CP 64, 66. To the extent that there was conflicting evidence, the court should hold a reference hearing to resolve the matter. See RAP 16.11(b).

The proper remedy in these circumstances is an issue of substantial public interest meriting review. RAP 13.4(b)(4). This Court should grant review.

E. CONCLUSION

The Court of Appeals' decision holding that Judge Middaugh was not required to recuse herself is contrary to precedent and presents an issue of substantial public interest. The substantive issue about whether DNA testing was properly denied also meets the criteria for review. It also provides this Court the opportunity to clarify its precedent and address whether reference hearings are appropriate in postconviction motions for DNA testing. So that he might demonstrate his innocence, Mr. Dublin respectfully asks that this Court grant discretionary review.

DATED this 11th day of January, 2018.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 75817-9-I
	)	DIVISION ONE
v.	)	
BRIAN DUBLIN,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: October 16, 2017

SPEARMAN, J. — A trial court must grant a motion for post conviction DNA (deoxyribonucleic acid) testing if favorable test results would establish the individual's innocence on a more probable than not basis. Brian Dublin challenges the denial of his motion for post conviction DNA testing. But because favorable test results would not establish a probability that Dublin was innocent, the trial court did not err in denying the motion. We also reject Dublin's assertion that the trial court erred in denying his motion to disqualify the judge. Dublin fails to show that the judge was biased or gave the appearance of bias, so that a reasonable observer would conclude that Dublin did not receive an impartial hearing. We affirm.

FACTS

A jury convicted Dublin of three counts of first degree burglary, two counts of first degree rape, and one count of attempted first degree rape. The convictions were based on three separate incidents in the same community. In each case, an intruder entered a young woman's bedroom at night, threatened her, and raped or attempted to rape her.

Dublin's motion for post-conviction DNA testing concerns his conviction for raping A.B. and burglarizing her home. At trial, A.B. testified that she was asleep in her room one night in 2003 when she woke to see an intruder holding what appeared to be a knife. The intruder ordered A.B. to take off her clothes. He put his mouth on her neck, breasts, and vaginal area. The rapist pulled his pants down far enough to expose his penis, rubbed his penis in A.B.'s vaginal and anal area, and raped her vaginally. The rapist told A.B. he would kill her if she reported the incident and left.

A.B. reported the attack and submitted to a sexual assault examination. Samples were taken from her neck, breasts, anus, and vagina. Analysis of these samples revealed DNA belonging to a single unidentified male. A nurse who examined A.B. stated that, according to her notes, A.B. reported that she had been sexually inactive for about two months prior to the attack.

Detective Patricia Maley testified that she was assigned to gather evidence from A.B.'s room. Maley and A.B. both testified that the room was very messy and contained "immense amounts" of clutter. Verbatim Report of

Proceedings (VRP) at 578. Maley did not personally speak to A.B., but gathered items from the room based on information from other detectives.

Maley stated that she took the sheets and pillow cases from A.B.'s bed because the incident happened on the bed. She took a stuffed panda bear into evidence because she "believe[d]" Detective Gordon told her that A.B. said the perpetrator's head was on the bear. Id. at 410. Maley collected a pair of scissors because she did not know if the attacker brought a weapon or used something that was in the room to threaten A.B. Maley also took a pair of men's underwear because she "believe[d]" Detective Gordon told her that the underwear was "possibly" from the suspect. Id. at 413-14. These items were not tested for DNA.

Maley explained that the information she got "was from detective – excuse me – Deputy Patino who got it from the shift before him, and I got it from Detective Gordon who got it from somebody else. Eventually he said it was believed that the suspect may have left behind these items." Id. at 414-15. Dublin asked if it was correct that Gordon told Maley that A.B. said the underwear belonged to the suspect. Maley replied that she believed so but he would have to ask Gordon.

Neither Dublin nor the State asked Gordon about the items taken from A.B.'s room. No further information concerning the underwear, bedding, scissors, or stuffed animal was elicited at trial.

Testimony at trial established that two other young women were assaulted by an intruder who entered their bedrooms at night. Twelve year old G.G.

managed to escape to her parent's bedroom after the intruder grabbed her genital area. But sixteen year old E.P. was the victim of a completed rape. E.P. was acquainted with Dublin and named him as a possible suspect.

Analysis of a DNA sample obtained from Dublin determined with a high degree of certainty that he was the source of the DNA recovered in the sexual assault examinations of A.B. and E.P. Detectives also found a notebook containing a list of names in Dublin's home. A.B.'s full name was at the top of the list, E.P.'s full name was at the bottom of the list, and G.G.'s initials were in the middle of the list.

Dublin's theory at trial was that the sexual encounters with A.B. and E.P. were consensual. He testified that he had consensual sex with A.B. in his truck sometime in 2003. Dublin denied any encounter with G.G. The jury rejected these theories and convicted Dublin as charged as to A.B., G.G., and E.P.[1] We affirmed his conviction in State v. Dublin, 175 Wn. App. 1013, 2013 WL 2919004 (2013) (Dublin I).

In October 2014, Dublin, acting pro se, filed a motion seeking post-conviction DNA testing of the underwear, bedding, stuffed animal, and scissors from A.B's bedroom. Judge Laura Middaugh, who had presided over the trial, denied Dublin's motion. Dublin appealed. State v. Dublin, 192 Wn. App. 1051, 2016 WL 785599 (2016) (Dublin II). In Dublin II, we concluded that the record failed to show that the trial court applied the required presumption that the results

[1] The jury acquitted Dublin of an indecent liberties charge involving a separate victim.

of DNA testing would be favorable to Dublin. Id. at *2. We reversed and remanded for the trial court to apply the correct standard.

In March 2016, after our opinion in Dublin II issued but before the mandate, Judge Middaugh entered a second order denying Dublin's motion. This order explicitly acknowledged the presumption of a favorable result. On the joint motion of the parties, Judge Middaugh vacated this order because it issued before the mandate, in violation of RAP 7.2 and 12.5.

Before Judge Middaugh considered the motion on remand, Dublin moved to disqualify the judge under the appearance of fairness doctrine. He asserted that the judge had made up her mind to deny his motion and was "unwilling or unable to apply the legal standard requiring a presumption that the evidence will be favorable to Mr. Dublin." CP at 137. The judge declined to recuse herself. On remand, the trial court also denied Dublin's motion for post conviction DNA testing. Dublin appeals the denial of both motions.

DISCUSSION

We first address Dublin's challenge to the denial of his motion for post-conviction DNA testing. We review a trial court's decision on a motion for post-conviction DNA testing for abuse of discretion. State v. Crumpton, 181 Wn.2d 252, 257, 332 P.3d 448 (2014) (citing State v. Riofta, 166 Wn.2d 358, 370, 209 P.3d 467 (2009)). The trial court abuses its discretion if its decision is manifestly unreasonable or if it was reached by applying the wrong legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (citations omitted).

A convicted person currently serving a prison sentence may file a motion requesting DNA testing with the court that entered the judgment of conviction. RCW 10.73.170(1). A successful motion must show that "the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). In determining whether the motion meets this test, the trial court must "presume that the DNA results would be favorable" to the convicted person. Crumpton, 181 Wn.2d at 258. The trial court must grant the motion if, "considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis." Id. at 260.

In Crumpton, for example, the Supreme Court reversed the trial court's denial of a motion for post conviction DNA testing. Id. at 261. In that case, a great deal of physical and circumstantial evidence incriminated Crumpton. Id. at 255-57. The victim's rape kit swabs, however, were not tested for DNA. Id. at 257. The Crumpton court held that, because there was only one rapist and no other sexual activity, any DNA recovered from the rape kit samples could only belong to the rapist. Id. at 261. The absence of Crumpton's DNA and the presence of another man's DNA on the swabs would establish that Crumpton was most likely innocent. Id. Because an exculpatory result would establish the likelihood that Crumpton was innocent, the trial court erred in denying his motion for post-conviction testing. Id.

In Riofta, on the other hand, the Supreme Court affirmed the denial of a motion for post conviction DNA testing. Riofta, 166 Wn.2d at 373. In that case, an assailant wearing a white hat got out of a stolen car and shot at a victim. Riofta, 166 Wn.2d at 362. The victim knew his assailant and identified him as Riofta. Id. The hat belonged to the car's owner. Id. at 363.

After Riofta was convicted, he moved for post conviction DNA testing of the hat. Id. The Riofta court considered both possible favorable outcomes: the absence of Riofta's DNA on the hat and the presence of third person DNA. Id. at 370. The court held that the absence of Riofta's DNA would not establish his innocence because, considering the short time the shooter wore the hat, it was not likely that the shooter left DNA on the hat. Id. And, assuming that Riofta was the assailant, his shaved head decreased the likelihood that he would have left DNA on the hat. Id. Likewise, the presence of third person DNA would not establish Riofta's innocence because any number of people could have worn the hat. Id. Because neither the absence of Riofta's DNA nor the presence of third-party DNA would raise a reasonable probability that he was innocent, the trial court did not err in denying his motion for post-conviction DNA testing. Id. at 373.

In this case, Dublin moved for post-conviction DNA testing of the underwear, bedding, stuffed animal, and scissors taken from A.B.'s room. The trial court denied the motion, ruling that neither the absence of Dublin's DNA nor the presence of another person's DNA on the untested items would establish a probability that Dublin was innocent. The order notes that "had there been

evidence that the men's underwear removed from the scene had been worn by the rapist the Court's response as to this item would have been different. However, the evidence at trial did not support this assertion." CP at 610.

Dublin contends that the trial court erred. He first challenges the trial court's conclusion as to the underwear. Dublin asserts that the record establishes that the rapist wore the underwear. Because underwear is unlikely to be shared, Dublin asserts that it is likely to contain only the rapist's DNA. Dublin argues that the absence of his DNA on the underwear and the presence of another man's DNA would support an inference that Dublin was innocent.

We disagree. The record in this case does not establish that the rapist wore the underwear. Detectives took the underwear into evidence because they believed it may have been worn by the perpetrator. But this supposition was not confirmed. A.B. stated that the rapist pulled his pants down far enough to expose his penis, indicating that he did not remove his underwear. The record provides no support for Dublin's theory that the rapist removed his underwear and left it in A.B.'s room.[2] Because the record does not link the underwear to the rapist, neither the absence of Dublin's DNA nor the presence of another man's DNA would establish Dublin's innocence. The trial court did not abuse its discretion in denying post conviction DNA testing of the underwear.

[2] Dublin urges this court to consider the police report documenting the items that were taken into evidence. The report is consistent with Detective Maley's testimony at trial and provides no further support for Dublin's argument.

Dublin next argues that the rapist may have left DNA on the stuffed animal and the scissors. This argument fails for the same reason. The record neither links these items to the rapist nor excludes the possibility that other people left DNA on the items.

Next, Dublin contends that the rapist touched the bedding and may have left semen on it. He argues that A.B. was sexually inactive for about two months before the incident and the record provides no evidence that a man other than the rapist was in her bed. Dublin asserts that, if semen from another male were recovered from the bedding, it would corroborate his claim that he never entered A.B.'s bedroom but had consensual sex with her in his truck. Id.

We reject this argument. In evaluating a motion for post conviction DNA testing, we assume exculpatory test results and consider those results along with all the evidence from trial. Crumpton, 181 Wn.2d at 260. The evidence in this case includes the results of DNA testing of the swabs from A.B.'s sexual assault examination. Dublin's DNA, and that of no other man, was recovered from A.B.'s vaginal swabs, anal swabs, and from swabs of A.B.'s neck and breasts. In light of this evidence, even if another man's DNA were found on the bedding, it would not establish a probability that Dublin is innocent. The trial court did not abuse its discretion in denying Dublin's motion for post conviction DNA testing.

Dublin next asserts that Judge Middaugh violated the appearance of fairness doctrine by declining to recuse herself. We review a trial court's decision

on recusal for abuse of discretion. State v. Gentry, 183 Wn.2d 749, 761, 356 P.3d 714 (2015) (citing State v. Davis, 175 Wn.2d 287, 308, 290 P.3d 43 (2012)).

Under the appearance of fairness doctrine, a judge must not be biased or give the appearance of bias. State v. Solis-Diaz, 187 Wn.2d 535, 539, 387 P.3d 703 (2017) (citing State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010)). Judges enjoy a presumption of "'honesty and integrity.'" State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007) (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). The party asserting a violation of the appearance of fairness doctrine must make a showing of a judge's actual or potential bias sufficient to overcome this presumption. Id. In evaluating the trial court's decision on recusal, the test is whether a reasonable observer who knows and understands the relevant facts would conclude that the parties received an impartial hearing. Solis-Diaz, 187 Wn.2d at 539.

Dublin contends that Judge Middaugh abused her discretion in declining to disqualify herself. He argues that the November 2014 and March 2016 orders denying his motion for post-conviction DNA testing expressed the judge's firm conclusion that Dublin's motion should not be granted.[3] Dublin asserts that a reasonable observer would conclude that Judge Middaugh might not be able to consider the issue again with an open mind. Id.

[3] Dublin also appears to assert that the judge's 2014 order was procedurally flawed because she engaged in an ex parte contact and denied Dublin's right to oral argument. This argument is without merit. Dublin provides no evidence of an ex parte contact and he provides no authority for the assertion that Dublin had a right to oral argument.

We disagree. Judge Middaugh erred in issuing the November 2014 order because the order did not reflect application of the correct legal standard. Dublin II, 192 Wn. App. at *2. The March 2016 order stated the correct legal standard but was issued prematurely. The orders were erroneous. But legal errors alone do not warrant recusal. State v. McEnroe, 181 Wn.2d 375, 388, 333 P.3d 402 (2014) (citing Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)). Dublin fails to make a showing of actual or potential bias sufficient to overcome the presumption that he received an impartial hearing. Chamberlin, 161 Wn.2d at 38.

Solis-Diaz in instructive. In that case, a juvenile was convicted in connection with a drive-by shooting. Solis-Diaz, 187 Wn.2d at 537. We affirmed his conviction but remanded for resentencing. Id. At resentencing, the judge expressed his disagreement with this court's order. Id. The judge found the remand for resentencing insulting and stated that it amounted to an opinion that he was "'ignorant, lazy, or stupid. . . .'" Id. The judge disputed this court's conclusion that Solis-Diaz received ineffective assistance of counsel and asserted that the original sentencing hearing was adequate. Id. at 538. The judge stated that his original sentence served legislative goals and had deterred similar gang related activity. Id. at 538-39. He imposed the same sentence. Id. at 537. We again vacated the sentence and remanded for resentencing. Id. at 539. But we declined Solis-Diaz's request to disqualify the sentencing judge. Id.

The Supreme Court accepted review of the disqualification issue. Id. at 536-37. The Solis-Diaz court held that the judge's comments reflected his "frustration and unhappiness" and "strongly suggest[ed]" that he had determined to impose the original sentence regardless of information presented at resentencing. Id. at 541. Analyzing the issue under the appearance of fairness doctrine, the Solis-Diaz court held that an objective observer could reasonably question the judge's impartiality. Id. at 540-41. The court ordered resentencing to take place before a different judge. Id.

In this case, unlike in Solis-Diaz, the judge made no comments disagreeing with the need for remand or suggesting that she would not reconsider Dublin's motion with an open mind. Dublin points to nothing indicating that Judge Middaugh failed to consider all the evidence before her on remand.[4] An objective observer would conclude that Dublin received an impartial hearing. The judge did not abuse her discretion in refusing to disqualify herself.

Affirmed.

WE CONCUR:

[4] At oral argument, Dublin conceded that the judge considered the briefing and other materials submitted on remand.

FILED
12/12/2017
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRIAN DUBLIN, Appellant.	)	No. 75817-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Brian Dublin filed a motion to reconsider the opinion filed in the above matter on October 16, 2017. A majority of the panel has determined the motion to reconsider should be denied.

Now therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

SO ORDERED.

FOR THE PANEL:

Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75817-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 11, 2018

WASHINGTON APPELLATE PROJECT

January 11, 2018 - 4:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75817-9
Appellate Court Case Title:	State of Washington, Respondent v. Brian Chadwick Dublin, Appellant
Superior Court Case Number:	10-1-04112-1

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